

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

G+ COMMUNICATIONS, LLC

Plaintiff,

v.

SAMSUNG ELECTRONICS CO., LTD.;
SAMSUNG ELECTRONICS AMERICA,
INC.;

Defendants.

Case No. 2:22-cv-00078-JRG

JURY TRIAL DEMANDED

**SAMSUNG'S SURREPLY TO PLAINTIFF G+ COMMUNICATION LLC'S
MOTION TO STRIKE PORTIONS OF THE REBUTTAL EXPERT
REPORT OF STEPHEN WICKER (Dkt. 190)**

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TABLE OF EXHIBITS

Exhibit No.	Description
11.	Excerpts from GComm's Fourth Supplemental Answer to Samsung's First Set of Interrogatories, dated June 28, 2023
12.	Excerpts from the Expert Report of John Kowalski, dated June 28, 2023
13.	Excerpts from the Deposition Transcript of Robert Akl, taken August 10, 2023
14.	Excerpts from the Expert Report of Dr. Robert Akl, dated June 28, 2023
15.	Excerpts from Addendum L from the Expert Report of Dr. Robert Akl, dated June 28, 2023
16.	Excerpts from the Rebuttal Expert Report of Prof. Stephen B. Wicker, Ph.D., dated July 19, 2023
17.	Excerpts from Defendants' P.R. 3-3 and 3-4 Invalidity Contentions and Subject Matter Eligibility Contentions, dated August 30, 2022

[REDACTED]
[REDACTED]
connection with the '881 and '443 patents. GComm moved the Court to supplement its late infringement contentions on June 28, 2023, and they were only allowed by the Court on the very day Dr. Wicker's rebuttal expert report on non-infringement was due, July 19, 2023. Dkt. No. 245 at 2-3. Therefore, Dr. Wicker's rebuttal opinion was timely.

III. DR. WICKER'S OPINION REGARDING BENEFITS WERE TIMELY

GComm wrongfully blames Samsung for failing to disclose, *during fact discovery*, the rebuttal to the new theories provided for the first time by GComm's technical experts in their reports, *after fact discovery*. GComm relies on [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] See Ex. 11 (Rogs 10, 13 GComm's Fourth Supplemental Answer to Samsung's First Set of Interrogatories) at 25-28, 31-33. Indeed, GComm's

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Compare *id.* with Ex. 12 (Kowalski Op. Rpt.) at ¶¶ 167-214. GComm's assertion that Samsung should have identified "categories of evidence" in fact discovery without seeing the actual theories injected during the expert discovery by Dr. Kowalski is misguided. In any case, GComm was not entitled to early disclosure of specific expert opinions via interrogatory requests. See, e.g., *Genband US LLC v. Metaswitch Networks Corp.*, No. 2:14-cv-33-JRG-RSP, 2016 WL 122969, at *2 (E.D. Tex. Jan. 9, 2016).

Lastly, GComm's reference to Samsung's counterclaim for GComm's breach of FRAND obligations is misleading. Dkt. No. 245 at 2. Samsung's position is that the patents-in-suit are not

[REDACTED]
[REDACTED]
essential to cellular standards, and that Samsung does not infringe them.

IV. DR. WICKER'S OPINION ON PRIOR ART WAS PROPER

Paragraphs 87-89, 91, 93. GComm attempts to strike from Dr. Wicker's opinion an explanation [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] GComm's references to *Baxter Healthcare Corp. v. Spectramed, Inc.*, 49 F.3d 1575, 1583 (Fed. Cir. 1995) and *Tate Access Floors, Inc. v. Interface Architectural Res., Inc.*, 279 F.3d 1357, 1365 (Fed. Cir. 2002) are irrelevant because Dr. Wicker's explanation of the technical concept and historical development of CRC is proper.

Paragraphs 49, 53, 57-58, 158. GComm's assertions that Dr. Kowalski does not credit the '443 patent with various fundamental technologies (HARQ, CRC) does not square with Dr. Kowalski's report.¹ Otherwise, GComm complains about Dr. Wicker's rebuttal [REDACTED]
[REDACTED]

[REDACTED] See Ex. 11 (Rogs 10, 13 GComm's Fourth Supplemental Answer to Samsung's First Set of Interrogatories) at 25-28, 31-33. Dr. Wicker should be able to explain that those fundamental technologies and alleged "novel aspects" were known before the '443 patent.

¹E.g., Ex. 12 (Kowalski Op. Rpt.) at ¶¶ 34-40 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

² See, e.g., Ex. 12 (Kowalski Op. Rpt.) at ¶¶ 44-45 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Paragraphs 173 and 289: GComm complains about Dr. Wicker's rebuttal

[REDACTED] GComm's request should be denied for the same reasons as discussed above for the '443 patent.³

Paragraphs 284: GComm seeks to preclude Dr. Wicker’s rebuttal of Dr. Kowalski’s opinion [REDACTED]

██████████ GComm did not disclose this argument to Samsung during fact discovery, so Dr. Wicker should be able to rebut this new theory from GComm’s expert. *See* Ex. 11 (Rog 10, GComm’s Fourth Supplemental Answer to Samsung’s First Set of Interrogatories) at 25-28.

V. DR. WICKER'S OPINIONS WERE NOT LEGAL CONCLUSIONS

GComm's referenced paragraphs from Dr. Wicker's report are not legal conclusions, and instead highlight [REDACTED]

██████████ Dkt. No. 245 at 12. GComm’s assertion that Samsung does not contest that Dr. Wicker’s opinion are directed to legal issues has no basis. Dkt. No. 274 at 4.

VI. DR. WICKER'S NON-INFRINGEMENT ALTERNATIVES OPINION WAS PROPER

Samsung does not need to show the non-infringing alternatives were on the market, as GComm incorrectly asserts; Samsung only needs to show the non-infringing alternatives were available. Dkt. No. 274 at 4-5; Dkt. No. 245 at 13; *TQP Dev., LLC v. Merrill Lynch & Co.*, No. 08-471, 2012 WL 3283354, at *2 (E.D. Tex. Aug. 10, 2012) (denying summary judgment due to

³ Indeed, GComm was [REDACTED] as it was produced and identified by Samsung in its invalidity contentions. Ex. 17 (Inv. Cont. Cover Pleading) at 19.

material fact issues regarding availability). Realizing that the documents containing non-infringing alternatives are U.S. Patent Application publications, and were available to Samsung before the time of alleged infringement, GComm re-invents its argument in the reply by contending that Samsung never licensed the patents issued from those patent applications. This argument is unavailing. Dr. Wicker [REDACTED]

[REDACTED] It is undisputed that the disclosures contained in those references were publicly available, including to Samsung. Regardless, the issue whether the non-infringing alternatives were “available” to Samsung given the technology’s conventionality in the field is a factual inquiry for the jury. *See TQP Dev.*, 2012 WL 3283354, at *2.⁴

VII. DR. WICKER’S OPINION ON THE [REDACTED] WAS PROPER

GComm does not dispute that the [REDACTED] was timely produced during fact discovery, over a month before fact discovery closed and expert reports were due. GComm also does not dispute that [REDACTED] Samsung discussed in interrogatory responses. GComm’s complaint that Samsung did not cite the [REDACTED] by name in interrogatory responses is unavailing, because it was not entitled to receive an expert opinion at that time. *See, e.g., Genband*, 2016 WL 122969, at *2. GComm’s reference to *ContentGuard Holdings, Inc. v. Apple, Inc.* is also inapposite. 2-13-cv-01112, Dkt. 820 at 3 (Aug. 3, 2015, EDTX) (C.J. Gilstrap). There, this Court denied leave to amend invalidity contentions to add a prior art system used by the defendant as a non-infringing alternative. *Id.* at 1-3. Here, Samsung timely produced the [REDACTED], and its interrogatory response put GComm on notice that licenses “will be further addressed in an expert report.” Dkt. No. 190-8 at 14.

⁴ Lastly, GComm’s request to strike Dr. Wicker’s reference [REDACTED] Ex. 16 (Wicker Reb. Rpt.) at ¶¶ 173, 284.

Dated: September 5, 2023

Respectfully submitted,

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[REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically in compliance with Local Rule CV-5 on September 5, 2023. As of this date, all counsel of record have consented to electronic service and are being served with a copy of this document through the Court's CM/ECF system under Local Rule CV-5(a)(3)(A) and by email.

/s/ Ralph A. Phillips

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]